IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 75.

THE UNITED STATES, PETITIONER,

vs.

ALGERNON BLAIR, Individually, and to the use of Roanoke Marble and Granite Company, Inc.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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WILSON PRINTING COMPANY, WASHINGTON, D. C.

INDEX

Citations

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OPINION BELOW.

The opinion of the Court of Claims is not yet officially reported, but appears at pages 76-92 of the transcript of record.

JURISDICTION.

The judgment of the Court of Claims was entered October 5, 1942. A motion for a new trial was filed by petitioner on December 4, 1942; argued orally on February 1, 1943, and overruled on March 1, 1943. The jurisdiction of this Court is invoked under the provisions of section 3(b) of

the Act of February 13, 1925, as amended by the Act of May 22, 1939.

STATEMENT.

The facts material to the questions presented by the petition for certiorari, as found by the Court of Claims, are as follows:

A. Delays.

(Findings 1-14, Tr. 31-44)

Respondent, Algernon Blair, being the lowest bidder in competitive bidding, entered into a contract with petitioner to construct at Roanoke, Virginia, fourteen buildings, with certain connecting and incidental structures, as a veterans hospital facility, and to do the necessary outside grading and paving, at a total contract price of $1,228,423.68 (Tr. 32-34). Petitioner entered into a separate contract with one C. J. Redmon, trading as Redmon Heating Company, (hereinafter called Redmon), whereunder Redmon agreed to install all plumbing, heating and electrical work in the buildings, in an orderly manner as respondent's work proceeded, for a price of $300,000 (Tr. 35).

Respondent's contract was dated December 2, 1933, and provided that performance would begin 10 days afer receipt of notice to proceed and would be completed within 420 days thereafter. Notice to proceed was given respondent on December 21, 1933, and he began work on that date (Tr. 33-4) and thereafter at all times proceeded therewith diligently (Tr. 36).

Redmon's contract was dated December 6, 1933, and provided that his work was to be commenced promptly after date of notice to proceed and was to be completed at a date not later than that of respondent. Notice to proceed was given Redmon on December 21, but neither he nor any representative of his appeared at the job until March

19, 1934, approximately three months later, after many urgent demands by the contracting officer that he proceed with his work and after the contracting officer advised Redmon that, if he did not have a representative on the site by March 15, his contract would be terminated (Tr. 35-36).

Meanwhile, Redmon's failure to begin his work had seriously hampered and delayed respondent. Beginning in January, 1934, respondent repeatedly advised the contracting officer, by letters, telegrams, telephone calls and personal visits, of this situation and protested in writing against the continued delay. The contracting officer's only response was to write letters to Redmon, urging him to begin work and advising him that his failure was delaying respondent. These requests were ignored by Redmon, who did no work and had no representatives at the site prior to March 19. The reasonable necessities in the circumstances and known to petitioner required Redmon's presence at the site in January, in order to coordinate his work with that of the plaintiff (Tr. 40-41).

In bidding on this job, respondent based his bid price on completion of the entire work by November 1, 1934, and so notified petitioner and Redmon soon after the work was commenced (Tr. 34-5, 37). This estimate, which was reasonable, was based upon respondent's experience in the performance of contracts for many similar construction projects in the past, he never having failed theretofore to complete a project within the time estimated by him (Tr. 38). In accordance with the usual practice in such cases, respondent prepared and supplied to petitioner and Redmon a detailed progress schedule, showing his intention to complete by November 1, 1934, which schedule was posted in petitioner's field office at the site of the work (Tr. 37). Although the contracting officer had notified respondent that it was the desire of the government that respondent's work be completed as soon as possible, petitioner's repre-

sentatives paid no attention to this progress schedule, and did not cooperate with or assist respondent in any reasonable manner to complete the work within this scheduled time (Tr. 37). On the contrary, the supervising superintendent of construction, who was the contracting officer's representative on the job, and his assistant, who acted as an inspector of respondent's work, falsely reported to the contracting officer (of which reports respondent had no notice, Tr. 36) that respondent was responsible for the delay (Tr. 44).

Redmon did no actual work until March 28, more than three months after he received notice to proceed. On that date, he had only four men on his force, including his superintendent. From that time until June 26 (when his contract was terminated, as hereinafter related), he never had more than six or eight men at work at a time. He never had adequate materials, tools, or working force. On June 26, he abandoned his contract and the same was terminated by petitioner. At that time, his entire force consisted of only six men. The surety on his bond then arranged with the Virginia Engineering Company to complete Redmon's work, and within two weeks thereafter the Virginia Company had a force of 107 men on the job, which was later increased to more than 200 men (Tr. 41). That company made every effort to overcome the delay which Redmon had caused, but it was unable to do so, so that respondent, though at all times prosecuting his work with due diligence, was unable to finish it until February 14, 1935. Redmon had completed only about six per cent of his work on June 26, or at the rate of about one per cent per month, whereas the Government's estimate of normal progress (i. e., progress necessary to complete within 420 days) for June 30 was 36 per cent. The Virginia Engineering Company's monthly progress was about 13.9 per cent (Tr. 43).

Redmon's failure to commence and prosecute his work

was due to financial difficulties and to willful neglect (Tr. 36).

The details concerning Redmon's delays and the effect thereof on respondent's work appear at pages 41-44 of the transcript. As a direct result, respondent was delayed in his work for a period of 3½ months, and by reason thereof incurred increased costs of $51,249.52 (Tr. 44).

B. Forced Construction of Scaffolds and Unfair Requirements Concerning Brickwork.

(Finding 15, Tr. 44-48.)

The recognized and accepted method of laying brickwork of the type covered by this contract is the so-called "over-hand" method, under which the brickmasons work from inside the walls, except where outside bracket or cantilever scaffolds are necessary at the floor levels to lay brick against the outside face of concrete spandrel beams. This method had been used previously by respondent on a similar construction job for petitioner, where the contracting officer and supervising superintendent were the same persons who acted as such on the Roanoke job. Use of this method on the prior job was with the full concurrence and approval of the supervising superintendent in question.

In making his cost estimates and preparing his bid on the Roanoke job, respondent based his figures on the use of the same method. However, when respondent commenced the brickwork at Roanoke, this superintendent, who was the contracting officer's duly authorized representative, and his assistant orally ordered him to build outside scaffolds around all buildings and to require the brickmasons to work from the outside in laying the brick. There was no provision of the contract or specifications requiring this method of doing the work. To respondent's protest that his contract did not require this, the superintendent re-

plied that, while he could not order or require respondent to build such outside scaffolds, he could and would make respondent "sorry if he did not do so or make him wish he had." Respondent asked the superintendent to put the order in writing, which request was refused. Respondent protested personally to the contracting officer, who listened sympathetically, but (as in the case of other claims here involved) stated he could do nothing about it and that respondent "would just have to do the best he could to get along" with the superintendent and his assistant (Tr. 49).

At first, respondent refused to obey the oral order to build the scaffolds, and the brickmasons did their work by the "over-hand" method, which produced better work than could have been done from outside scaffolds. Thereupon, the supervising superintendent and his assistant, solely for the purpose of forcing respondent to build the scaffolds, entered upon a course of petty tyranny, making numerous exactions and requirements of respondent which, the Court of Claims found, were "unauthorized, arbitrary, capricious and so grossly erroneous as to imply bad faith,"[1] and rejecting all brickwork which did not meet these improper requirements. They told respondent that he could not lay brickwork that would be acceptable unless he used outside scaffolds.

Thereupon, the Court found, respondent was "confronted with a situation and with requirements that it was impossible to meet and overcome", and acceded to the order to build outside scaffolds, which were unnecessary, delayed respondent's progress, and were very expensive. As soon as respondent began the use of these scaffolds, the improper requirements as to uniformity were promptly abandoned.

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[1]The particular requirements which were used to force the building of outside scaffolds, and their impropriety and absurdity, are set forth at Tr. 47. Other improper exactions in connection with the brickwork are related in detail at Tr. 45-46.

The Court of Claims found (and petitioner does not attack this finding) that the improper requirements as to brickwork, including labor and materials, cost the respondent $25,886.84 (Tr. 47-48).

C. Arbitrary and Unauthorized Acts of Inspection.

(Findings 16 and 20, Tr. 48-51, 70-74.)

Petitioner's supervising superintendent at Roanoke and his assistant, from the outset of the work, without justification, acted in an unreasonable, arbitrary and unauthorized and unfair manner toward respondent. Constantly, and without respondent's knowledge, they made false, misleading and unfair reports to their superiors concerning respondent and his work; required respondent to do things admittedly not required of him under his contract, on threat of reprisals for refusal, at the same time refusing to put such requirements in writing so that respondent might effectively appeal therefrom; capriciously and without reason reversed their own rulings after respondent had begun compliance therewith; and unreasonably interfered with and disorganized respondent's work by using harsh, profane and abusive language to respondent's employees.

In the early stages of the work, respondent successfully appealed to the contracting officer from improper requirements by the superintendent and his assistant. These two men, in their resentment at thus being overruled and for the purpose of punishing respondent for protesting their rulings, entered upon the above-described course of unreasonable, unauthorized, improper and unfair conduct toward respondent and his employees, which course of conduct was continued by them until the completion of respondent's work.

As a result of this unreasonable conduct by petitioner's representatives at the job, it was impossible for respon-

dent's superintendent to handle protests and appeals to the contracting officer and respondent found it necessary to send two extra representatives to the site of the work to handle such protests and appeals. With respect to all of the claims here involved, respondent timely and fully protested personally to the contracting officer and advised him fully of the reasons and necessity of oral protests and conferences. With full knowledge of the facts, the contracting officer acquiesced in this procedure. He never requested or directed that protests be in writing, and never failed or refused to hear them. However, as to many of them, he made no definite decision, and in the many cases herein described of unreasonable and arbitrary acts and instructions of the officers at the site of the work, he stated that, while he understood respondent's troubles, there was practically nothing he could do about it, and that respondent would just have to do the best he could to get along with those officers. Cordial relations did not exist between those officers and the contracting officer's office (Tr. 49). With full knowledge of the arbitrary and capricious attitude of these officers at the site of the work, the contracting officer declined respondent's request for their removal, which request was reasonable and justified (Tr. 82).

Finding 16 (Tr. 48-51) sets forth the details of a number of these improper rulings which the Court found resulted in extra expenses to respondent aggregating $9,033.21. Finding 20 (Tr. 70-74) further illustrates the vindictiveness and bad faith of petitioner's representatives at the job.

D. Excessive Rodmen's Wages.

(Finding 17, Tr. 51-62.)

Article 18 of the contract (Tr. 52-53) prescribed minimum wages of $1.10 per hour for "skilled labor" and 45 cents per hour for "unskilled" labor. It prescribed no specific rate for "semi-skilled" labor, but provided that

such workmen should not be treated as "unskilled". The class of labor known as "semi-skilled" or "intermediate" was and is a class customarily recognized in the construction industry, both by employers and labor, as entitled to a wage rate between the rates paid "skilled" and "unskilled" workmen.

The form of contract in question had been prescribed as the standard form by the Federal Emergency Administration of Public Works, which furnished the money for the project. While preparing his bid, respondent wrote a letter to that agency asking if the form of contract in question would permit the employment of semi-skilled labor at such intermediate rates, and was assured in writing that this would be permitted. In the fall of 1933, as the result of a suggestion by the Public Works Administration, the Virginia Public Works Advisory Board requested the governor of that state to call a conference for the purpose of agreeing upon a schedule of wage rates for these intermediate workers. The conference was called and a committee composed of representatives of contractors, labor and borrowers of public funds was appointed and agreed upon a schedule of such rates (Tr. 55; P's. Ex. 91-B).

Workmen who place and tie reinforcing steel rods for concrete construction, called "rodmen", are customarily classified as semi-skilled labor. The only tools used by such workmen are wire pliers and sometimes steel cutters. They work under the direct supervision and instructions of experienced foremen. While the schedule above mentioned (P's. Ex. 91-B) did not refer to rodmen by name, it contained the following rate provision: "Apprentices, Helpers, or certain Unskilled Laborers at 60c per hour." Prior to and during the performance of respondent's contract, and since that time, the construction industry and labor, as well as the government, under other contracts of the same terminology, recognized, treated and classified rodmen as

semi-skilled workmen entitled only to the prevailing intermediate wage rate.

Respondent computed his bide price on the basis that rodmen would be paid a minimum wage rate of 60 cents per hour, and he paid them that minimum until required to pay them $1.10 per hour as hereinafter set forth. Before commencing the work, respondent posted and submitted to petitioner his schedule of work classifications and wage rates, which listed rodmen as semi-skilled at an intermediate rate of 60 cents per hour. Petitioner's supervising superintendent approved this schedule, and respondent operated thereunder until sometime in March. Being unable to procure locally workmen who were experienced in such work, and being required by the contract to give preference to local laborers, respondent, by agreement with the superintendent, began using the more intelligent laborers (supplied by the government employment office) for this work and, with the consent and approval of the superintendent, paid them at the rate of 60 cents per hour.

However, on March 10, petitioner's supervising superintendent took the position that these men should be paid $1.10 per hour, on the sole ground that the contract recognized only two classes of labor, "skilled" and "unskilled", and that all labor which did not clearly fall into the unskilled or common labor classification must be classified and paid as skilled labor. No such claim was made by any of respondent's employees, and respondent at no time had any issue or controversy with his laborers or with any labor union. The controversy was raised by petitioner's superintendent of construction and involved merely an interpretation of the contract.

Respondent promptly protested this interpretation, both to the supervising superintendent and the contracting officer. The superintendent on March 15, 1934, without respondent's knowledge, wrote to the Department of Labor, stating that, under the contract, there were "only two

scales, skilled and unskilled labor", that he was unable to determine in which of these classes the rodmen should be placed, and requesting the Labor Department's "interpretation". A Labor Department official replied, on March 20, 1934, that the Public Works Administration had determined that "men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen." Petitioner did not know and the record does not show who, in the Public Works Administration had made any such determination. After the contents of this letter were transmitted to respondent by petitioner's superintendent, coupled with an order to pay these men, retroactively, at $1.10 per hour, respondent protested to the contracting officer and was granted a conference on the matter. The contracting officer, solely on the basis of the Labor Department letter of March 20, and without making an independent decision thereon, refused to reverse the superintendent's ruling. This action of the contracting officer was unauthorized, arbitrary and so grossly erroneous as to imply bad faith (Tr. 59). Respondent then complied therewith, and paid, for wages of rodmen at $1.10 per hour, an excess of $4,365.12 over what would have been paid them at the 60-cent rate.

During the progress of the work, petitioner's supervising superintendent and his assistant arbitrarily, capriciously, unreasonably and grossly erroneously interfered with and delayed the reinforcing steel workmen, which action resulted in damages to respondent of $4,291.93 (Tr. 62).

E. Excessive Carpenter's Wages.

(Finding 18, Tr. 62-64.)

The intermediate grade of semi-skilled carpenters is generally recognized by industry and labor and is customarily paid at a lower rate than skilled carpenters. Men in this classification are permitted to make certain concrete forms,

scaffolds, temporary buildings, etc., and act as assistant to skilled carpenters on higher grade work (such as millwork, trim, cabinet work, etc.) Use of this type of labor was specifically recognized and permitted by the Federal Emergency Administration of Public Works (Tr. 63; P's. Exs. 38 and 39).

Respondent estimated, in preparing his bid, that he would pay such semi-skilled carpenters at the rate of 60 to 65 cents per hour, which was the prevailing wage for such work in Roanoke and vicinity, and began by paying such rates, which action was approved by petitioner's superintendent. However, in March, for the same reasons stated in connection with rodmen's pay, the superintendent ordered respondent to pay these men at the rate of $1.10 per hour, saying that any man who used a tool was a skilled mechanic.

Respondent protested to the superintendent and to the contracting officer. The latter made no independent decision or ruling on this specific question, which was a part of the same controversy relating to rodmen's pay. The requirement as to carpenters' wages was based solely on the superintendent's letter of March 15 to the Labor Department and the reply of March 20, above described, which dealt only with the question of rodmen's pay and was unauthorized, arbitrary and so grossly erroneous as to imply bad faith (Tr. 63-64).

F. Excessive Wages for Tile, Terrazzo and Marble Work.

(Finding 19, Tr. 64-70.)

The intermediate grade of semi-skilled laborers employed as helpers, improvers and terrazzo grinding machine operators is generally recognized by industry and labor in the trade of installing tile, terrazzo, marble and soapstone work, and that grade is customarily paid at a lower rate than skilled mechanics. Improvers and experienced helpers

in this trade are men who are informed as to the different kinds of tile for particular spaces and who are able to select and prepare tile for setting, cut tile to fit spaces, grout the joints and clean the tile after it is set, mix the mortar for tile and terrazzo work, mix the plaster for setting marble and soapstone, drill the holes for and assist marble setters in placing angles and dowel pins (Tr. 64, 65).

The Roanoke Marble and Granite Co., Inc., the subcontractor under respondent's contract, estimated, in the preparation of its bid for the furnishing of materials and performance of all labor necessary to install and complete the tile, terrazzo, marble and soapstone work, that it would pay such helpers, improvers and terrazzo grinding operators at the rate of 60 cents per hour, the prevailing wage for such work in that vicinity, and also estimated and contemplated the use of one helper at 60 cents per hour to assist each skilled mechanic at $1.10 per hour, with sufficient common labor at 45 cents per hour to handle and move materials and to clean up the finished work (Tr. 64-65).

The subcontractor began work in accordance with this trade practice and its estimate in August, 1934. However, in September 1934, for the same reasons stated in connection with the pay of rodmen and assistants to carpenters, the petitioner's supervising superintendent told and directed the subcontractor and respondent that only two classes of labor would be permitted to be employed on the work, namely, skilled mechanics at $1.10 per hour and common labor at 45 cents per hour, that there was no intermediate wage scale for that class of work, and that helpers, improvers, apprentices and semi-skilled laborers who used tools could not be employed unless they were paid the mechanics' wage of $1.10 per hour (Tr. 65-66). This action of the supervising superintendent was unauthorized, arbi-

trary and so grossly erroneous as to imply bad faith (Tr. 59, 64, 65).

Both respondent and the subcontractor protested to petitioner's superintendent and to the contracting officer, but complied with the instructions and orders and continued all of the work to completion under the contract before the contracting officer reversed the ruling and order of the supervising superintendent and sustained the contention of the subcontractor and respondent as to the employment of semi-skilled mechanics at 60 cents per hour for grinding of terrazzo, as hereinafter stated. As a result, all labor costs were increased over those estimated in the bid and over those which would otherwise have been necessary (Tr. 66).

On December 7th, the subcontractor made written protest to petitioner against the order of the supervising superintendent to make retroactive payment at the rate of $1.10 per hour to semi-skilled mechanics operating terrazzo grinding machines, setting forth in detail the facts with reference to the controversy and the practice of employing semi-skilled mechanics at intermediate wage rates, and the contracting officer finally decided the question in favor of the subcontractor, as the latter had contended all along as to all three items. The contracting officer decided and ruled in writing on January 14, 1935 (after the work was completed) that the contract did contemplate and provide for intermediate classifications of labor at a minimum wage rate between that fixed for skilled labor and unskilled or common labor. However, neither respondent nor the subcontractor was reimbursed for the said excess labor costs (Tr. 66-70).

QUESTIONS PRESENTED.

1. Where respondent, a general contractor, in accordance with the usual practice, planned to complete his work in substantially less than the maximum time permitted him under the contract, and so advised petitioner, (the latter

offering no objection to the plan), but was unreasonably delayed and interfered with by agents and employees of petitioner, is respondent precluded from recovering the damages sustained as a result thereof merely because of the fact that he completed the work on the last day of the maximum period allowed him by the terms of the contract?

(a) Under such conditions, where the plumbing, heating and electrical installation work was being done by Redmon under a separate contract with petitioner, and Redmon unreasonably and in willful breach of his contract interfered with and delayed respondent, was it petitioner's duty, under its contract with respondent, to force Redmon to desist from such interferences and delays or to terminate Redmon's contract when it became apparent Redmon could not or would not perform?

(b) Under such conditions, where it is the usual and recognized practice for the plumbing, heating and electrical contractor to prosecute his work in an orderly and diligent fashion, so as not unreasonably to delay the progress of the work of the general contractor, and Redmon continuously and willfully neglected to do so for a period of six months (under a contract requiring completion within 420 days), was petitioner's failure for such six months to take reasonable steps to force such action by Redmon a breach of petitioner's contract with respondent?

2. Where petitioner's authorized agents, in bad faith, ordered respondent to do his work in a manner admittedly not required under the contract, refused respondent's request that such orders be put in writing, and forced compliance with such illegal orders by punishment and threats of further punishment which respondent was powerless to prevent, is respondent precluded from recovering his resulting damages merely because of the failure of such agents to put the orders in writing, under contractural pro-

visions that "changes in the drawings and (or) specifications" and "extra work or material" must be ordered in writing?

3. The contract provided (Article 15) that disputes concerning questions arising under the contract "shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive." Petitioner's superintendent, who was the duly authorized representative of the contracting officer, in bad faith and without authority, ordered respondent to follow unnecessarily expensive methods of work and to pay wage rates not demanded by respondent's employees which were far in excess of the required rates, but such representative refused, upon request, to put most of such orders in writing, because he knew they were unjustified. Upon appeal to and reversal of similar action by the contracting officer, who was the duly authorized representative of the head of the department, the superintendent entered upon a course of deliberate punishment of respondent and thereafter forced compliance with such illegal orders through such punishment and threats of further punishment. As a result, it was impossible for respondent to follow the mode of written appeals contemplated by Article 15, and he was coerced into adopting the procedure of promptly and fully presenting, in personal conference with the contracting officer, protests and appeals from such illegal orders. The contracting officer acquiesced in this procedure, but made no independent decision adverse to respondent on any of such protests. As to some of the issues, the contracting officer adopted, without independent consideration, decisions of unauthorized persons sustaining the rulings of his representative, which action the Court of Claims found was unauthorized, arbitrary and so grossly erroneous as to imply bad faith. Upon the only issue in-

volving a construction of the contract, the contracting officer eventually decided in respondent's favor, but too late to save respondent the costs resulting from the earlier erroneous ruling. As to the other issues, the contracting officer failed to take any action, stating that he, the contracting officer, was unable to interfere and that respondent "would just have to do the best he could to get along" with the contracting officer's representatives. Under these circumstances, is respondent precluded from recovering the damages sustained by him as a result of such illegal requirements, because he did not file written appeals in every instance to the contracting officer or the head of the department?

ARGUMENT.

I. Delays.

Petitioner asserts that, insofar as the damages granted for delay are concerned, the Court of Claims has refused to follow the decisions of this Court in *United States* v. *Rice*, 317 U. S. 61, and *Crook Co.* v. *United States*, 270 U. S. 4.

In the *Rice* case, as in our case, separate contracts were made for general construction of the buildings and for the installation therein of the so-called mechanical equipment, namely, plumbing, heating and electrical equipment and connections. There the plaintiff was the mechanical equipment contractor who, as the Court pointed out, is under the duty of coordinating his own activity into the schedule of the general contractor. In the instant case, the plaintiff below was the general contractor, who was damaged by the failure of the mechanical contractor to perform his contractual obligation (Tr. 35) to install his work in an orderly manner as respondent's work proceeded, and by the failure of the government to require him to do so.

Furthermore, in the *Rice* case, the delay in the work resulted from the "unexpected discovery of an unsuitable

soil condition", which necessitated a postponement of the *beginning* of the work until a suitable site could be found. The contract, as in this case, reserved to the government the right to make changes upon discovery of "subsurface and (or) latent conditions * * * materially differing from those shown on the drawings", etc., which might interrupt the work, and the Court said that "delays incident to the permitted changes cannot amount to a breach of contract."

In the *Crook* case, the plaintiff, as in the *Rice* case, was the mechanical equipment contractor, having agreed to begin its work *after* the completion of buildings then in process of construction by others. The mechanical contractor was not to begin work until delivery of the contract to it by the government, and was to complete within 200 days thereafter. The contract recited only the *approximate* dates of completion of the construction work. Such construction work was not completed by the approximate dates so stated. The cause of the delays does not appear, although this Court held them to be "unavoidable". The mechanical contractor, without protest, began its work when the buildings were ready, but because of this delay, did not complete until 387 days after delivery of his contract. There was no showing of interference by the government after the work began. The government extended the permitted time of completion accordingly and paid the full contract price. The mechanical contractor then sued for damages resulting from the delay in commencement of the work. The Court of Claims denied recovery on the ground that plaintiff waived any claim it might have had by going on with the work without protest. This Court affirmed on the ground that, because the dates of completion of preliminary work by others were "approximate" only, "it was obvious on the face of the contract" that the date for completion of plaintiff's work was "provisional", and that, under such

circumstances, the government was not bound to any particular date.

In the instant case, on the other hand, each contractor was given unqualified notice to proceed with the work, which notices were never countermanded; the mechanical contractor's work was not to await completion of respondent's work, but he was to "fully cooperate with" and "carefully fit his own work to that" of respondent, and not to "commit or permit any act which will interfere with the performance of work by any other ntractor" (Tr. 31); there was no discovery of changed conditions or any other circumstance or condition justifying delay in the work; the contracting officer constantly urged completion of the work as soon as possible (Tr. 37, 38-39); respondent proceeded with diligence in the prosecution of the work; and the sole cause of the delay was the willful neglect of the mechanical contractor, which petitioner permitted, (a) to begin his work until more than three months after notice to proceed and (b) to prosecute his work with any degree of diligence during the three months intervening between the commencement thereof and the date on which petitioner terminated his contract. Throughout these two periods respondent continuously requested the contracting officer to require the mechanical contractor to begin and properly prosecute his work, as was the contracting officer's right and duty in view of the clear breach of contract by that contractor, and pointed out the serious consequences of the delay to respondent. These efforts by respondent were, in part, nullified by false reports concerning the delay made by the contracting officer's representatives at the job, and which were not disclosed to respondent. The mechanical contractor's failure, however, was so patent that the contracting officer continually urged the mechanical contractor to begin his work, but did nothing to force such action when his requests were ignored.

In view of these circumstances, argument hardly seems

necessary to demonstrate the proposition that the decision below in no way conflicts with either the *Rice* or the *Crook* case. Neither of those cases altered in any way the rule established by a long line of decisions in the Court of Claims[2] and in this Court,[3] that, in the absence of contractual provisions specifically relieving the government of liability for delay, it is liable to a contractor for any damages resulting to the contractor from delays caused by the acts or omissions of the government or independent contractors with the government, or from interference by the government's agents with the orderly progress of the contractor's work. The rights of the parties are to be determined by the application of the same principles as if the contract were between individuals. *Reading Steel Casting Co.* v. *United States*, 268 U. S. 186. In the case of such private contracts, the same rule is well established.[4]

The petitioner argues (Br. pp. 21-22) that the government had no right to compel Redmon to complete his work before the last day of the 420-day period prescribed as the maximum time within which respondent could complete without being subject to penalties. It is thus contended that the maximum limit automatically became the minimum. The obvious answer appears in the findings of the Court of Claims that:

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[2]*Cotton* v. *United States*, 38 C. Cls. 536; *Hyde* v. *United States*, 38 C. Cls., 649; *Snare & Triest Co.* v. *United States*, 43 C. Cls. 364; *Miller* v. *United States*, 49 C. Cls. 276; *Page* v. *United States*, 56 C. Cls. 176; *Edge Moor Iron Co.* v. *United States*, 61 C. Cls., 392; *Schmoll* v. *United States*, 91 C. Cls. 1; *Baruch Corporation* v. *United States*, 92 C. Cls., 571.

[3]*Clark* v. *United States*, 6 Wall. 543; *United States* v. *Smith*, 4 Otto (94 U. S.) 214; *Mueller* v. *United States*, 113 U. S. 153; *United States* v. *Barlow*, 184 U. S. 123; *United States* v. *Wyckoff Pipe & Creosoting Co.*, 271 U. S. 263.

[4]*Michigan Ave. M. E. Church* v. *Hearson*, 41 Ill. App. 89; *Stehlin-Miller-Henes Co.* v. *Bridgeport*, 97 Conn. 657, 117 Atl. 811; *Del Genovese* v. *Third Ave. R. Co.*, 13 App. Div. 412, 43 N. Y. Supp. 8, aff'd. 162 N. Y. 614, 57 N. E. 1108; *State* v. *Parish*, 23 Miss 483.

1. Redmon, from start to finish, violated his contractual obligation to refrain from interference with the orderly progress of respondent's work, and petitioner failed to fulfill its duty to take appropriate action to prevent the unreasonable delay and interference which resulted (Tr. 31, 35, 37, 44).

2. Redmon, during the period preceding the termination of his contract, completed only about one per cent of his work per month (Tr. 43). It was thus obvious, long before the termination of his contract, that he was not prosecuting the work, to use the language of Article 9 of the Contract (P's. Ex. 2), "with such diligence as will insure its completion within the time specified". Petitioner therefore had the clear right and duty to invoke Article 9, terminate his right to proceed, take over his work, and charge the excess costs to Redmon and his sureties. This is precisely what petitioner finally did on June 26, though it was clear long before that date that Redmon could not complete it.

3. Respondent's plan to complete in less than the maximum time was in accordance with the usual practice in such cases (Tr. 37). It was a reasonable estimate (Tr. 38) and he would have completed within the time so planned if petitioner had required Redmon to perform his contractual obligations (Tr. 44).

4. On January 24, 1934, respondent notified Redmon of his plan to complete his work by November 1st (Tr. 37). Consistent with that plan, respondent prepared a detailed schedule of anticipated progress, which he supplied to Redmon and petitioner. Petitioner's officers posted this plan in their field office at the site of the work (Tr. 37), thus giving it official approval. The record is devoid of any protest by either Redmon or petitioner, or any suggestion that the plan placed an unreasonable burden on Redmon, whose duty was to make his installations in an orderly manner as respondent's work proceeded (Tr. 35).

5. Without regard to the contractual time limit placed upon completion of respondent's work, orderly and reasonable cooperation by Redmond required (a) his presence at the job in January instead of March, (b) the employment of a substantial force of workmen and adequate equipment, (c) completion of his outside work[5] by the end of April, (d) completion of his underground work in the buildings immediately following respondent's general excavation, (e) furnishing of detailed drawings, and (f) prompt installation of equipment around which respondent's construction work was to be placed. In each and every one of these respects, Redmon utterly failed because of financial difficulties and willful neglect (Tr. 36, 40-43).

II. Alleged Necessity for Written Change Orders.

Petitioner asserts that the decision of the Court of Claims is in conflict with *Plumley* v. *United States*, 226 U. S. 545, 547-548, in that certain of the illegal requirements above described constituted either

> (a) "changes in the drawings and/or specifications" of the contract "and within the general scope thereof" which, pursuant to Article 3 of the contract, were required to be in writing, or
>
> (b) "extra work or material", for which, under Article 5, no allowance can be made unless ordered in writing.

In the *Plumley* case, the contract provided that the plaintiff would complete the building of the Naval Observatory, after it had been partially completed by McLaughlin &

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[5] i. e., the digging of trenches, the laying of steam, water, drainage and other pipes, and the refilling and settling of the trenches, so that respondent could complete his grading and paving.

Company, whose contract had been forfeited. Plumley, being thoroughly familiar with the McLaughlin contract and the work done by that company, agreed to complete the work in accordance with the provisions of the McLaughlin contract and "any duly authorized changes" therein. The contract provided that changes increasing or diminishing the cost must be agreed upon in writing and approved by the Secretary. Numerous extra items of work and material were ordered and installed by Plumley on verbal instructions by the government superintendent. No written authority was requested by Plumley or given, and no attempt was made to get the Secretary's approval. The Court held that Plumley could not charge for these items.

On this phase of the case, petitioner refers (Br. 23) to only four items:

1. The outside scaffolds.
2. The bolting of concrete "pans".
3. The requirement of duplicate fine grading.
4. The use of temperature steel.

None of these items involved any change in the drawings or specifications, and none of them involved the furnishing of any extra values to petitioner which could have been made the basis of an increase in the contract price,[6] with the exception of the temperature steel, which the contracting officer held was an improper requirement. Consequently neither Article 3 nor Article 5 would have any bearing on the controversy in any event. Like the order given the contractor in *United States* v *Barlow*, 184 U. S. 137, each of them constituted "an exercise of unwarrantable superin-

[6] If an order from the owner does not in any way affect the contract price, it is not an "extra" of the type covered by Article 5. *Badders* v. *Davis*, 88 Ala. 367, 6 So. 834, *Lantry Contracting Co.* v. *Atchison, T. & S. F. R. Co.*, 102 Kan. 799, 172 P. 527.

tendence", and therefore a breach of contract entitling respondent to recovery of his resulting damages.

The most striking of the features of the instant case, which distinguish it from the *Plumley* case, are:

1. None of the orders complained of in the instant case involved any change in specifications or the supplying by respondent of any extra work or material, except the temperature steel controversy, in which respondent's position was sustained.

2. In the instant case, respondent requested that the orders be put in writing, but the government's superintendent, realizing that his demands were improper, denied the request, and forced compliance with his illegal orders through punishment of respondent and threats of further punishment (Tr. 24-25, 26). The provisions of Article 3, defining and limiting the authority of the contracting officer to change the drawings and specifications, and of Article 5, prohibiting recovery for work or material supplied in addition to that covered by the contract unless ordered in writing, manifestly have no application. No such breach of contract by the government as was found by the Court below was even claimed to exist in the *Plumley* case.

III. Alleged Necessity for Written Appeals.

Petitioner asserts that the decision below is in conflict with this Court's decisions in *United States* v. *McShain*, 308 U. S. 512, and *United States* v. *Callahan Walker Co.*, 317 U. S. 56, "insofar as the court below holds it unnecessary for a claimant to avail himself of the contractual provision for appeal from the contracting officer's decision to the head of the department."

In the *McShain* case, this Court reversed a decision of the Court of Claims (88 C. Cls. 284), without opinion, on the authority of *Plumley* v. *United States, supra*, p. 547; and

Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387, 393. All of these cases dealt with the matter of conflicting, ambiguous, or inconsistent provisions in the contract, plans or specifications. In each of them, the parties lodged in the contracting officer or some other official the power to resolve such a conflict and made his decision as to the proper construction final and binding. In none of these cases was there any finding of bad faith, or of arbitrary or threatening conduct on the part of any government official. In each, the contractor appealed to the officer so designated, who considered the case on the merits and honestly decided against the contractor's claim.

In the *Callahan Walker* case, the dispute was as to what would constitute an "equitable adjustment" for additional excavation work properly covered by a change order. The contractor filed no appeal from the contracting officer's determination. As this Court said, this question involved merely the ascertainment of the cost of the work to the contractor and the addition to that cost of a reasonable and customary allowance for profit. "These are inquiries of fact. If the contracting officer erroneously answered them, Art. 15 of the contract provided the only avenue for relief." The Court also said:

> "There are no findings that the contracting officer failed to ascertain the probable cost of the new work or that he did not honestly decide that the contract price would be a fair allowance for the extra work."

In the instant case, petitioner fails to point out which of the six items allowed by the Court of Claims were erroneously allowed on the authorities cited. We submit that none of the cases cited by respondent is in point, as to any of the items allowed, for the following reasons:

(1) Delays.

There was no dispute between the parties calling for

decision by the contracting officer or for an appeal from his decision. Many written appeals were made to him to put a stop to the delays; he recognized the existence of the delays, as claimed by respondent, and so stated in numerous letters to Redmon (P's. Ex. 42).

(2) Outside Scaffolds.

There was no dispute as to what was required by the contract. The government's superintendent agreed with respondent that there was no such requirement and, for this reason, refused to put the order in writing, saying he would make respondent "sorry" if he did not obey (Tr. 47). When respondent protested to the contracting officer, the latter gave the matter no consideration on the merits at all and avoided a decision (Tr. 49). When respondent refused to obey the admittedly illegal order, the superintendent, solely for the purpose of forcing obedience thereto, exacted over-meticulous and absurd uniformity of work to such an extent that respondent was confronted with a situation "impossible to meet and overcome" and therefore did as he was told (Tr. 47-48). These exactions and requirements were unauthorized, arbitrary, capricious and so grossly erroneous as to imply bad faith (Tr. 47).

Article 15 deals with "disputes concerning questions arising under this contract". The purpose was to prevent interruption in the work on account of disputes or disagreements between the parties as to the work required of the contractor under the contract.[7] It does not contemplate or require that, where a contractor is confronted with inspectors who are continuously guilty of improper, arbitrary, capricious, coercive and tyrannous acts of inspection, he must bombard the contracting officer with formal written complaints or suffer the consequences. Under these con-

[7] *Penker Construction Co.* v. *United States*, ____ C. Cls. (No. 43277, decided Feb. 2, 1942).

ditions, respondent did everything that could or should be required of him when he fully informed the contracting officer of the outrageous conduct of these subordinates and begged for relief (Tr. 49). As the court below held, denial of this relief was a clear breach of contract (Tr. 76-77).

(3) Unfair Inspection.

The same general statements apply to cases of unfair inspection set out in Finding 16 (Tr. 48-51), except that there was a written appeal to the contracting officer on the temperature steel question, and this dispute was decided by him in respondent's favor. The other rulings (as to the bolting of the concrete pans and extra process of fine grading), the Court of Claims found were "unreasonable, arbitrary and so grossly erroneous as to imply bad faith." The court further found (Tr. 49) that the government superintendent admitted that these acts were not required of respondent under the contract. Compliance was forced through threats of reprisals for refusal. Respondent was punished for taking written appeals, and when appeals were presented in person to the contracting officer, the latter simply washed his hands of responsibility and decided nothing (Tr. 49). The Court of Claims also found as a fact that, as a result of the attitude and acts of petitioner's officers at the site of the work, which constituted a clear breach of contract, it was impossible for respondent to appeal in the form prescribed by Article 15 (Tr. 49-50).

(4) Excessive Wage Rates.

As to the wage rate controversies, these all stemmed from the government superintendent's construction of the meaning of the contract. There was no ambiguity in the contract itself, and no conflict between any of its terms. The superintendent first placed this construction on the

contract on March 10, holding that only two classes of labor could be used, namely, "skilled" and "unskilled", and that intermediate or semi-skilled labor must be classified and paid as skilled labor. Plaintiff protested this ruling to the contracting officer, who, as in the other cases above mentioned, made no independent decision on the question until it was too late to help respondent. To bolster his opinion of the meaning of the contract, the superintendent wrote a letter to the Department of Labor (which had no authority in the matter) in which he asked for an opinion on an entirely different question and misrepresented the contract provisions. The Department's answer to that letter, based upon the misstatement of the contract provisions, was arbitrary and grossly erroneous as applied to the real controversy (Tr. 57-61). Thereafter, the contracting officer, without any independent consideration of the question, refused to interfere, relying solely upon this grossly erroneous ruling by an unauthorized person. The Court found as a fact that the contracting officer's action in this respect was unauthorized, arbitrary and so grossly erroneous as to imply bad faith (Tr. 59, 64).

Furthermore, on the fundamental issue of whether semi-skilled workmen could be employed, the contracting officer finally reversed the superintendent by holding that operators of terrazzo grinding machines should be classed as "semi-skilled" laborers. In other words, the contracting officer decided and ruled in writing on January 14, 1935, that the contract did contemplate and provide for intermediate classifications of labor at a minimum wage rate between that fixed for skilled labor and unskilled labor (Tr. 68, 83). However, this was long after the work of these operators was completed, and they had been paid and had dispersed, so the damage was done (Tr. 69, 70). This reversal of itself established the bad faith of the construction previously put upon the contract by the government's representatives,

and constituted a favorable decision on this question, from which there was no necessity of appeal.

To summarize, as to Article 15, the instant case is clearly distinguishable from the cases relied upon by petitioner because:

(a) None of the issues here involved the resolving of a conflict between provisions of the contract or specifications, as did the *McShain* case, cited by the petitioner.

(b) In each and every item on which recovery was allowed below, the Court found that the rulings of the government's representatives were so grossly erroneous as to imply bad faith. Under such circumstances, the contractor is not bound by the terms of a provision like Article 15[8].

(c) In most of the instances involved, there was no real dispute as to the requirements of the contract, and the Government's superintendent, while forcing obedience through threats of punishment, refused to render a decision from which an appeal could be taken, thus making it impossible for respondent to comply literally with the provisions of Article 15 (if that article would otherwise be applicable) so as to obtain a fair and impartial decision on the basis of a true state of facts. *Cf. United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236. The contracting officer's attitude was not merely "repellant of appeal or of any alternative but submission with its consequences", as in *United States* v. *Smith*, 256 U. S. 11, but he failed and refused to render independent decisions, and in some instances followed blindly the grossly erroneous

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[8] *Ripley* v. *United States*, 223 U. S. 695; *United States* v. *Smith*, 256 U. S. 11; *Sweeney* v. *United States*, 109 U. S. 618; *Levering & Garrigues Co.* v. *United States*, 71 C. Cls. 739, 757; *Fruin-Bambrick Const. Co.* v. *Ft. Smith & W. R. Co.*, 140 Fed. 465. See numerous state decisions to same effect, collected at 34 A. L. R. 1267.

decision of another official who had no authority to decide disputes.

(d) The only real "dispute" between the parties was over the question of whether the contract permitted the employment of semi-skilled labor at intermediate wage rates. It cannot be presumed, in the absence of clear and express provision to that effect, that the parties intended to give to the contracting officer or the head of the department the power to pass upon the law of the contract, and thus deprive the contractor of resort to the courts in event of a breach. The decision of such an official upon a question of the proper construction of the contract is never binding upon the contractor.[9] However, the contracting officer's final ruling of January 14, 1935, on this question of construction of the contract, *sustained* respondent's position, so that there was no reason for any appeal to the head of the department.

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[9] *Mitchell* v. *Dougherty*, 90 F. 639; *Haskell* v. *McClintic-Marshall Co.*, 289 F. 405, 409; *Tatsuma K. Kaisha* v. *Prescott*, 4 F. (2d) 670; *Rae* v. *Luzerne County*, 58 F. (2d) 829; *Lyons* v. *United States*, 30 C. Cls. 352; *Collins and Farwell* v. *United States*, 34 C. Cls. 294; *Albina Marine Iron Works* v. *United States*, 79 C. Cls. 714; *Sollitt & Sons Co.* v. *United States*, 80 C. Cls. 798; *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461; *Overly, et al* v. *United States*, 87 C. Cls. 231; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 610, 637; *Galveston H. & S. A. R. Co.* v. *Henry*, 65 Tex. 685; *Derby Desk Co.* v. *Connors Bros. Constr. Co.*, 204 Mass. 461, 90 N. E. 543; *Nat'l. Contracting Co.* v. *Hudson River Water Power Co.*, 192 N. Y. 209, 84 N. E. 965.

CONCLUSION.

The decision of the Court of Claims does not conflict with any of the decisions relied upon in the petition for certiorari, and involves no unsettled principle requiring a review by this Court.

Respectfully submitted,

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